BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGELIO HERNANDEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,522
SOUTHWEST EXPRESS, INC.	)	
Respondent	)	
AND	)	
	)	
KANSAS TRUCKERS RISK MANAGEMENT GROUP	)	
Insurance Carrier	)	

ORDER

Claimant appealed from Administrative Law Judge Pamela J. Fuller's October 18, 2001, Decision. The Appeals Board heard oral argument on April 2, 2002.

APPEARANCES

Claimant appeared by his attorney, Steve Brooks of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Scott Gordon of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Decision.

ISSUES

Claimant injured his back on February 26, 1998, when he fell while working for respondent. The Administrative Law Judge (ALJ) found claimant suffered a 5 percent permanent partial general disability based on claimant's permanent functional impairment.

On appeal, claimant contends that, after he received medical treatment for his back injury, respondent changed ownership and did not return him to work. Accordingly, claimant argues he was unable to obtain post-injury employment that paid wages of at least 90 percent or more of his pre-injury average weekly wage and, therefore, he is entitled to a work disability. Claimant argues he proved that his permanent work

restrictions as a result of the back injury caused him to suffer a 66 percent work task loss and when that work task loss is averaged together with the difference between his pre-injury average weekly wage and various post-injury wages he proved a work disability that exceeds his permanent functional impairment.

In contrast, respondent, in his brief before the Board, argues that claimant should be denied benefits because he (1) failed to prove he suffered an accidental injury arising out of and in the course of his employment and (2) failed to prove he provided respondent with timely notice of the accident. If the Board finds claimant suffered a compensable back injury, the respondent argues that the ALJ's award of 5 percent permanent partial general disability should be affirmed. Furthermore, the respondent argues that claimant is not entitled to a work disability because he failed to prove that he sustained either a work task loss or a post-injury wage loss as a result of his work-related injury.

The claimant also listed in his Application for Review, that his pre-injury average weekly wage was an issue for Board review. But at oral argument, the parties stipulated that claimant's pre-injury average weekly wage was $701.71.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board finds the ALJ's Decision should be modified and claimant is entitled to a higher permanent partial general disability award based on a work disability.

Findings of Fact

1. On February 26, 1998, claimant had been employed by the respondent since March 1992, as the shop foreman and mechanic.

2. On February 26, 1998, claimant had climbed a ladder to the fender of a trailer to place decal letters on the side of a trailer. As claimant was attempting to climb down the six foot ladder, his foot slipped on one of the ladder's rungs and the ladder and the claimant fell to the concrete floor. Claimant landed on his heels and then fell backwards to the floor.

3. Claimant immediately knew he had injured his back as a result of the fall.

4. On the day of the fall, respondent's owner and claimant's supervisor, Terry Mickler, was out of town. Mr. Mickler returned to work in approximately two weeks, whereupon claimant immediately reported the accident to Mr. Mickler and respondent arranged for claimant to receive medical treatment.

5. Claimant received conservative medical treatment from six different physicians until he met maximum medical improvement on March 9, 1999.

6. Claimant was diagnosed with myofascial back pain and chronic low back syndrome with lumbar spine degenerative disc disease. Claimant's conservative medical treatment consisted of epidural steroid injections, work hardening and medications.

7. Dr. Susan Englehart, a rehabilitation physician, was the last physician to treat claimant and released claimant on March 9, 1999, to return to work with permanent restrictions of no lifting or carrying of more than 20 pounds and to avoid repetitive bending, twisting and stooping.

8. Claimant returned to respondent and requested work, but respondent's new owners did not offer claimant employment.

9. From the time claimant was released to return to work on March 9, 1999, to his regular hearing deposition on July 23, 2001, claimant made application for employment to over 238 employers.

10. During that time period, claimant also found employment in the following jobs: (1) Hugoton Tire Company for one month earning $5.00 per hour working full time or $200 per week, (2) driving a truck or tractor for a farmer during the summer of 2000 earning $10.00 per hour, (3) driving a truck in Colorado for three weeks, and (4) repairing grocery carts at $10.00 per hour working full time in Colorado.

11. At claimant's regular hearing deposition, he had secured employment with a fence company in Hugoton, Kansas working part time at $6.00 per hour.

12. At respondent's attorney's request, claimant was examined and evaluated by physical medicine and rehabilitation physician Philip R. Mills, M.D. on September 8, 1999. Claimant related a history to Dr. Mills of previous low back problems occurring first in 1994 from stepping down wrong from a truck and next in 1997 while lifting a tire. Both times claimant received chiropractic treatment and the problem resolved.

Dr. Mills' history contained claimant's description of his February 26, 1998, fall while employed by the respondent. Dr. Mills also had been provided with claimant's previous medical treatment records for review.

After conducting a physical examination of claimant, Dr. Mills diagnosed claimant with low back sprain with possible L4-5 interspinious ligament compression syndrome and underlying degenerative arthritis and depression. The doctor opined, within a reasonable degree of medical probability, that there was a causal relationship between claimant's current complaints and the February 26, 1998, work accident described by claimant.

Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA Guides, Fourth Edition), Dr. Mills opined that claimant suffered a DRE Lumbosacral Category II permanent functional impairment of 5 percent of the body as a whole. The only work restriction that Dr. Mills suggested was for claimant to work with good body mechanics.

Dr, Mills reviewed a list of work tasks that claimant had performed in the 15 year period next preceding his work accident. Vocational expert Karen Terrill had compiled this work task list as a result of an interview with claimant. Dr. Mills opined that claimant retained the post-injury ability to perform all of those work tasks.

13. Retired orthopedic surgeon C. Reiff Brown, M.D., at the request of claimant's attorney, examined and evaluated claimant on November 22, 2000. Dr. Brown had been provided with claimant's previous medical treatment records to review.

Dr. Brown took a history from claimant that began with claimant's February 26, 1998, fall while working for respondent. At the time of the examination, claimant continued to have complaints of pain in the lumbosacral areas present to some extent at all times and increased with physical activity. As the pain increased, claimant also had pain extend into his left leg.

After completing a physical examination of claimant, Dr. Brown diagnosed claimant with degenerative disc disease at L5-S1 objectively determined by MRI examination. He also found claimant had evidence of lumbar radiculopathy on the left with absence of left reflex, a one centimeter decrease in circumferential measurement of the left calf and decrease in sensory perception in the S1 distribution.

In accordance with AMA Guides, Fourth Edition, Dr. Brown placed claimant in the DRE Lumbosacral Category III for a 10 percent permanent functional impairment of the body as a whole. He permanently restricted claimant from lifting over 50 pounds occasionally, 30 pounds frequently, and to lift utilizing proper body mechanics.

The doctor attributed claimant's current low back complaints to his fall at work on February 26, 1998. Dr. Brown opined that the fall aggravated, accelerated, and intensified claimant's preexisting degenerative disc disease.

Because Dr. Brown did not record a history of claimant's previous low back injuries and chiropractic treatments, respondent's attorney questioned Dr. Brown extensively as to the accuracy of the medical opinions he expressed on causation, permanent functional impairment and restrictions as a result of his examination of claimant. But Dr. Brown testified that since claimant's degenerative disc disease was asymptomatic before the February 26, 1998 fall, the restrictions he placed on claimant were attributable to the fall that rendered claimant symptomatic. Dr. Brown further clarified that the restrictions he placed on claimant also were based on his diagnosis that claimant had degenerative disc

disease with lumbar radiculopathy. Dr. Brown also opined that a person with a history of an asymptomatic back and then an injury causing the back to be symptomatic, whether the person has a preexisting condition or not, the AMA Guides, Fourth Edition DRE categories are specific that the injury precipitated those symptoms.

Dr. Brown reviewed a list of work tasks that claimant had performed in jobs he had been employed in the 15 years preceding his work accident. The task list had been developed by vocational expert Jerry Hardin after interviewing the claimant. The claimant also identified the task list as accurate at the time he testified during his regular hearing deposition. Based on the permanent restrictions Dr. Brown imposed on claimant's work activities, he opined that claimant could no longer perform 25 out of a total of 38 tasks for a 66 percent task loss.

14. Solomon Hernandez, a fellow employee of claimant when he worked for respondent, testified in this case as to what he observed when claimant fell at work on February 26, 1998. Mr. Hernandez testified by deposition on July 23, 2001, more than three years after claimant fell at work.

Mr. Hernandez was asked, "Did you see what happened on February 26, 1998 that we are here discussing today, the accident?" Mr. Hernandez answered, "Well, I don't see it, really nothing."[1] But Mr. Hernandez went on to testify that he did see claimant miss a step on the ladder and claimant fell about two feet to the floor and did not fall on his back to the floor. On cross examination, Mr. Hernandez, however, testified he was on the back side of the shop when claimant fell. Mr. Hernandez was then asked, "So you couldn't actually see him?" Mr. Hernandez replied, "Not exactly."[2] Mr. Hernandez testified that before claimant fell, claimant was some four feet above the floor placing decal letters on a trailer. Finally, Mr. Hernandez was asked, "You don't remember much about this day at all?" Mr. Hernandez replied, "No."[3]

Conclusions of Law

1. In proceedings under the Workers Compensation Act, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which that right depends.[4]

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[1] Solomon Hernandez's deposition, July 23, 2001, p.5.

[2] Solomon Hernandez's deposition, July 23, 2001, p. 15.

[3] Solomon Hernandez's deposition, July 23, 2001, pp. 18-19.

[4] *See* K.S.A. 1997 Supp. 44-501(a) and K.S.A. 1997 Supp. 44-508(g).

2. The Board concludes that claimant's testimony coupled with the medical opinions of the two physicians who testified in this case, Dr. Brown, and Dr. Mills, proved that claimant's low back symptoms were caused by the February 26, 1998, fall at work that aggravated or intensified his previous preexisting degenerative disc disease in his low back.

The Board is mindful of Solomon Hernandez's testimony that claimant only fell two feet instead of the six feet which claimant testified that he fell. The Board, however, finds Solomon Hernandez's testimony very questionable because of the length of time between the fall and his testimony and the equivocation he expressed during his testimony.

3. An injured worker is required to provide respondent with notice of a work-related accident within 10 days or establish within 75 days just cause for not providing respondent with the 10 day notice. Additionally, the 10 day and the 75 day limitation does not apply if the employer was unavailable to receive notice.[5]

Here, the Board finds that claimant established that respondent's owner and his supervisor Terry Mickler was out of town and not available for claimant to provide notice of accident until approximately two weeks after the accident. At the time Mr. Mickler returned to work, claimant promptly notified him of the accident. Thus, the Board finds claimant provided respondent with the required timely notice of the accident.

4. An injured worker is entitled to permanent partial general disability in excess of permanent functional impairment as long as the worker's post-injury wages are less than 90 percent of the worker's pre-injury wages.[6]

Here, the claimant was released to return to work with permanent restrictions on March 9, 1999. He returned to the respondent for work, but respondent's new owners did not offer him employment. Claimant then sought other employment. At his regular hearing deposition on July 23, 2001, claimant established he had found employment and had worked for various employers, but not at a wage of 90 percent or more of his pre-injury average weekly wage.

The ALJ found claimant was limited to a 5 percent permanent partial general disability based on functional impairment without an explanation as to the reason she denied claimant a higher work disability. The ALJ found Dr. Mills' permanent functional impairment opinion more reliable than the opinion of Dr. Brown. The Board, however, finds no reason to not equally consider Dr. Brown's 10 percent permanent functional impairment

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[5] *See* K.S.A. 44-520 (Furse 1993).

[6] *See* K.S.A. 1997 Supp. 44-510e(a).

opinion with that of Dr. Mills' 5 percent opinion. Thus, the Board finds that, as a result of claimant's February 26, 1998, work-related injury, claimant suffered a 7.5 percent permanent functional impairment of the body as a whole.

5. The Board also finds claimant proved he is entitled to work disability because first respondent did not offer claimant a job after he was released to return to work.[7] Second, the Board finds claimant proved he made a good faith effort to find appropriate employment after he was released to return to work.[8] In fact, claimant established through his testimony that from the time he was released to return to work with permanent restrictions on March 9, 1999, he had found and worked for four different employers but not for wages of 90 percent or more of his pre-injury average weekly wage.

6. At the time of the claimant's regular hearing deposition, claimant also testified that he had secured employment at a fence company in Hugoton, Kansas, working part time at $6.00 per hour.

7. The Board finds claimant's work task loss falls somewhere between Dr. Mills' 0 percent loss and Dr. Brown's 66 percent loss. Thus, the Board concludes that claimant's work task loss for determining claimant's work disability is 33 percent.

8. The Board, therefore, finds that claimant's work-related back injury caused him to be temporarily and totally disabled and suffer permanent partial general disability for the following time periods after the February 26, 1998, accident.

(1) Commencing February 27, 1998, the day following claimant's accident, claimant was temporarily and totally disabled for 43 weeks or until December 25, 1998.

(2) Commencing December 26, 1998, and until claimant was released to return to work on March 9, 1999, claimant was entitled to 10.57 weeks of permanent partial disability for a 7.5 percent permanent partial general disability based on claimant's permanent functional impairment.

(3) Commencing on March 10, 1999, claimant worked for 4.43 weeks for Hugoton Tire Company for a 52 percent work disability (71 percent wage loss averaged together with a 33 percent task loss).

(4) Commencing April 10, 1999, and until July 23, 2001, claimant's regular hearing deposition, because claimant failed to prove the actual number of weeks he earned $400

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[7] *See* Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[8] *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

per week while working on the farm and while working repairing grocery carts, claimant's work disability for that period should be based on the post injury wage of $400 per week entitling claimant to 119.43 weeks of permanent partial disability for a 38 percent work disability (43 percent wage loss averaged together with a 33 percent task loss).

(5) Commencing on July 24, 2001, claimant secured employment earning $6.00 per hour part time. But the record does not contain any evidence as to the actual number of hours per week claimant was to work on a part-time basis. Thus, the Board finds claimant's work disability commencing July 24, 2001, should be computed based on 40 hours because claimant does not have a permanent restriction prohibiting him from working a 40 hour week. Therefore, commencing July 24, 2001, claimant is entitled to 57.14 weeks of permanent partial disability for a 49.5 percent work disability (66 percent loss of wages averaged together with a 33 percent task loss).

9. Respondent is ordered to pay all reasonable and necessary medical expenses associated with the treatment of claimant's February 26, 1998, accidental injury as authorized medical.

10. Unauthorized medical expenses up to the statutory maximum are awarded to the claimant upon proper presentation of the expense.

11. Future medical treatment shall be provided by the respondent upon application and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that ALJ Pamela J. Fuller's October 18, 2001, Decision should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rogelio Hernandez, and against the respondent, Southwest Express, Inc., and its insurance carrier, Kansas Truckers Risk Management Group, for an accidental injury which occurred on February 26, 1998, and based upon an average weekly wage of $701.71.

Claimant is entitled to 43 weeks of temporary total disability compensation at the rate of $351.00 per week or $15,093.00, followed by 10.57 weeks of permanent partial disability compensation at the rate of $351.00 per week or $3,710.07 for a 7.5 percent permanent partial general disability, followed by 4.43 weeks of permanent partial disability compensation at the rate of $351.00 per week or $1,554.93 for a 52 percent permanent partial general disability, followed by 119.43 weeks of permanent partial disability compensation at the rate of $351.00 per week or $41,919.93 for a 38 percent permanent

partial general disability, followed by 57.14 weeks of permanent partial disability compensation at $351.00 per week or $20,056.14 for a 49.5 percent permanent partial general disability, making a total award of $82,334.07.

As of July 31, 2002, there would be due and owing to claimant 43 weeks of temporary total disability compensation at $351.00 per week, or $15,093.00, plus 187.86 weeks of permanenet partial disability compensation at $351.00 per week or $65,938.86, for a total sum of $81,031.86, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $1,302.21 should be paid at $351.00 per week, until fully paid or until further order of the Director.

Respondent is ordered to pay all reasonable and necessary medical expenses associated with the treatment of claimant's February 26, 1998, work-related injury as authorized medical.

Future medical shall be provided upon application and approved by the Director.

Unauthorized medical expenses up to the statutory maximum is ordered to the claimant upon proper presentation of the expense.

All other orders contained in the Decision are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director